83-1343

Office - Supreme Court, U.S.
FILED
FEB 14 1984
ALEXANDER L. STEVAS
CLERK

CASE NO.: _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ALBERTO LOPEZ-LLERENA, FELIX PARRA,
and JOSE BORGES,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

**Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit**

GEOFFREY C. FLECK, ESQUIRE
WILLIAM R. TUNKEY, ESQUIRE
WEINER ROBBINS TUNKEY & ROSS, P.A.
2250 Southwest Third Avenue
Miami, Florida 33129
(305)858-9550
February 14, 1984

Counsel for the Petitioners

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE DECISION BELOW PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW AND CREATES IRRECONCILABLE CONFLICT WITH THE PRECEDENT OF THIS COURT BY HERALDING THE END OF THE TIME HONORED MERE PRESENCE RULE.

II. WHETHER THE DECISION BELOW CREATES IRRECONCILABLE CONFLICT WITH VARIOUS CIRCUIT COURT DECISIONS INCLUDING United States v. Lopez-Ortiz, 492 F.2d 109 (5th Cir. 1974); United States v. Reyes, 595 F.2d 275 (5th Cir. 1979); and United States v. Pintado, 715 F.2d 1501 (11th Cir. 1983).

PARTIES TO THE PROCEEDING IN THE COURT BELOW

United States of America
Alberto Lopez-Llerena
Felix Parra
Jose Borges
Jose Delfin Mule Vasquez
Lazaro Cruz, Jr.
Hector Theodore Valdes
Fausto Manuel Sanchez
Raul Pinera
Carlos Olivera-Chirino
Jose Luis Marino

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW.....	i
PARTIES TO PROCEEDING IN COURTS BELOW.....	i
OPINION BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.....	2
STATEMENT OF THE CASE.....	4
REASON FOR GRANTING THE WRIT.....	7
I. THE DECISION BELOW PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW AND CREATES IRRECONCILABLE CONFLICT WITH THE PRECEDENT OF THIS COURT BY HERALDING THE END OF THE TIME HONORED MERE PRESENCE RULE.	7
II. THE DECISION BELOW CREATES IRRECONCILABLE CONFLICT WITH VARIOUS CIRCUIT COURT DECISIONS INCLUDING United States v. Lopez-Ortiz, 492 F.2d 109 (5th Cir. 1974); United States v. Reyes, 595 F.2d 275 (5th Cir. 1979); and United States v. Pintado, 715 F.2d 1501 (11th Cir. 1983).	17

CONCLUSION..... 27

CERTIFICATE OF SERVICE..... 29

APPENDIX

A. Lower Court Opinion

B. Order Denying Petition for Rehearing and Rehearing En Banc.

TABLE OF AUTHORITIES

Cases	PAGE
Sibron v. New York, 392 U.S. 40 (1968).....	7
Ybarra v. Illinois, 444 U.S. 85 (1980).....	8
United States v. Blasco, 702 F.2d 1315 (11th Cir. 1983).	14,15
United States v. DiRe, 332 U.S. 581 (1948).....	7
United States v. Lopez-Ortiz, 492 F.2d 109 (5th Cir. 1974)...	17,18, 19
United States v. Pintado, 715 F.2d 1501 (11th Cir. 1983).	17,20, 21,22, 23,24, 25
United States v. Reyes, 595 F.2d 275 (5th Cir. 1979)...	17,19
CONSTITUTIONAL PROVISIONS Fifth Amendment, United States Constitution.....	2
Sixth Amendment, United States Constitution.....	2,3
RULES Rules of the Supreme Court of the United States, Rule 20.....	2

STATUTES

21 U.S.C. Section 846..... 3
28 U.S.C. Section 1254(1)..... 2
28 U.S.C. Section 1291..... 6

CASE NO.: _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ALBERTO LOPEZ-LLERENA, FELIX PARRA,
and JOSE BORGES,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

**Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit**

OPINION BELOW

The Opinion of the lower court is reported in United States v. Lopez-Llerena, 721 F.2d 311 (11th Cir. 1983), rehearing denied, 721 F.2d 311 (11th Cir. 1983).

JURISDICTION

The Judgment of the Court of Appeals for the Eleventh Circuit affirming the Petitioners' convictions was entered on August 30, 1983. On December 16, 1983, the Eleventh Circuit denied the Petitioners' Petitions for Rehearing and Rehearing En Banc.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C., Section 1254(1) and Supreme Court Rule 20.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

U.S. Const., Amendment VI:

> In all criminal prosecutions, the

> accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

21 U.S.C., Section 846, attempt and conspiracy:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

The Petitioners, ALBERTO LOPEZ-LLERENA, FELIX PARRA, and JOSE BORGES, were arrested as a result of a law enforcement raid on two neighboring houses in a residential area in Key Largo, Florida, following an off-load of marijuana from two vessels docked behind the premises. They, along with eight co-defendants, were charged in a two count Indictment with conspiracy to possess with intent to distribute marijuana and with possession of marijuana. Each of the Petitioners was ultimately found guilty of conspiracy and not guilty of the possession count.

The evidence showed that when various police vehicles with flashing blue lights and sirens sounding converged on the premises, various suspects ran in different directions. At least three people climbed an external

stairway and went into the upstairs portion of one of the two neighboring houses raided. When the house was ultimately searched, fifteen minutes after the initial raid, whispered voices were heard emanating from an upstairs bedroom. Officers announced their presence and ordered the occupants of the premises out whereupon the Petitioners LOPEZ-LLERENA, PARRA, and BORGES exited voluntarily. There was no evidence to show that the Petitioners were the same people seen entering the house previously. The Petitioners, similarly, were never identified as having participated in any way in the off-load operation.

There were no fingerprints, no photographs, no evidence of the Petitioners' recent exertion, no marijuana residue, no statements, no contraband on any of the Petitioners' persons, or evidence of flight.

There was, however, substantial evidence

to show that other people at the scene had avoided detection and apprehension. Nevertheless, the Petitioners were arrested, charged and convicted because of their proximity to the off-load operation. By the agents' own admission, they would have, and did, arrest everyone they found. Because eleven people had been observed participating in the off-load and eleven people were ultimately arrested, each of the Petitioners has suffered a fate derived as if from predestination. Such a result does not comport with either the promise of a fair trial or the guarantee of due process afforded by the Fifth Amendment to the United States Constitution.

The Eleventh Circuit's jurisdiction to entertain Petitioners' direct appeal was predicated upon 28 U.S.C., Section 1291.

REASONS FOR GRANTING THE WRIT

I.

The decision below presents an important question of federal law and creates irreconcilable conflict with the precedent of this Court by heralding the end of the time honored mere presence rule.

The decision of the Eleventh Circuit Court of Appeals affirming the Petitioners' convictions for conspiracy to possess marijuana signals the death knell of the heretofore established "mere presence doctrine" in this jurisdiction. It has long been the rule, as held by this Court in United States v. DiRe, 332 U.S. 581, 593 (1948), that mere presence is insufficient, without more, to sustain a conviction for conspiracy. Likewise, equally well established is the doctrine repeatedly expressed as in Sibron v. New York, 392 U.S.

40, 62-63 (1968), and Ybarra v. Illinois, 444 U.S. 85, 91 (1980), that:

> [A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.

The decision of the Eleventh Circuit in this case signifies an extraordinary and irreconcilable departure from the time honored rule that mere presence, even when coupled with flight, is not alone enough upon which to predicate criminal convictions.

In the case at bar, two vessels, the "Sunshine" and the "Odette", were observed by police being unloaded of their cargoes of marijuana during the early morning hours of December 22, 1981. The "Sunshine" arrived first, docked behind a house in Key Largo, Florida, and approximately an hour later, after the "Sunshine" had departed, the "Odette" docked behind a house next door. [TR. 82-84, 88]. It appeared to surveilling

officers that eleven people, all together, were involved in each off-load operation. None of the Petitioners at trial were identified by any Government witness as having been involved in either off-load operation. None of the Government's witnesses could identify any Petitioner as having been observed at any specific location on the 21st or 22nd of December, 1981, prior to their arrest. [TR. 418-419]. No surveilling officer was able to see the faces of any of the people at the scene. They could not describe what any of the people were wearing. The individuals involved could only be seen as silhouettes. [TR. 84-85]. It was not known whether the people seen were black or white. [TR. 217, 454].

There was no attempt to obtain fingerprints in this case. [TR. 124-126]. Although the "Sunshine" was later seized in the Miami River, no evidence was presented

that it was tested for latent fingerprint impressions so as to identity the people who had been on board it. [TR. 156-157]. No evidence was presented that any of the suspects had marijuana residue on their clothing. Apparently, no attempt was made to gather such evidence. [TR. 218-222]. Radio broadcasts and communications related to the investigation were monitored, however, none were admitted into evidence or described by any witness. [TR. 150]. No conversations or interceptions were recorded. [TR. 150].

No attempt was made to take photographs of the off-loading operation. [TR. 151, 242]. No evidence was presented that any of the Petitioners on trial owned either of the houses or vessels involved in this case. [TR. 193-194]. Later investigation revealed that one of the houses was owned or rented by an individual uncharged in this case. [TR. 152]. Papers located on the vessel

"Odette" indicated that its owner was also a person who was not arrested. [TR. 147].

The critical deficiency in the Government's case against the Petitioners involves the fact that the prosecution was based solely upon a "numbers game." All that was certain was that anyone on the premises or in the immediate area would be arrested even though the actual arresting officer had no knowledge of how many people were involved in the off-loading operation. [TR. 301-302]. However, since eleven people were observed in the off-loading operation, it was predestined that eleven people would be arrested and face trial in this case.

The defect in the Government's theory of the case, however, involved not only the insufficiency of the evidence against the Petitioners, but the fact that there was evidence that guilty persons involved in the off-load operation had escaped detection

while innocents were indiscriminately arrested and charged. The undisputed evidence presented by the Government demonstrated that Drug Enforcement Administration Agent William Simpkins took possession of two wallets discovered in the first house. [TR. 668-669]. The two people identified by documentation found within the wallets were not arrested. [TR. 669-671]. The wallets contained various checks, bank deposit slips, documents, and approximately eight hundred to one thousand dollars in cash. [TR. 686].

In addition, the Government's own evidence established that one man observed during surveillance carried a machine gun type weapon described as an Uzi machine gun. [TR. 90, 371-372]. None of the eleven defendants arrested in this case possessed a weapon. No weapons were found in either house. [TR. 306, 322].

In addition to the missing weapon, the two people who abandoned their wallets, money, and personal possessions to the scene, and whatever unknown, unobservable people remained within the premises and in the proximity of the vessels, there existed the express admission by the Government witnesses that more than the eleven people arrested may have been involved. Prior to the raid, the roadway coming into the area was not closed. [TR. 207]. Accordingly, after eleven people were apprehended, a search was nevertheless conducted of the area because it was unknown whether or not more people were in front of the house. [TR. 209-210]. One surveilling officer expressly admitted he could not testify whether or not any of the suspects had escaped from the area and avoided apprehension. [TR. 423].

Thus, the decision of the Eleventh Circuit invites, if not compels, devotion to

the idea that one's suspicious mere presence at the scene of a crime sustains proof beyond a reasonable doubt of one's guilt. In addition, the court's departure from established United States Supreme Court doctrine is aggravated by its misplaced reliance upon its own prior decision in United States v. Blasco, 702 F.2d 1315 (11th Cir. 1983), cert. denied, ___ U.S. ___.

As set forth in the factual recitation in Blasco at 1320-1321:

> The Cohen estate is bordered by water on two sides -- the southern end of the residence rests upon a canal, and the western portion of the property extends to the Spanish Harbor Channel. The remaining two sides are enclosed by a chain-link fence, and, on the night in question, the gate across the road leading to the residence was padlocked.

Moreover, the Blasco court revealed that "the officers moved . . . to . . . a point from which they could see the entrance to the canal leading to the Cohen property." Id. at

1321. Also, the officers involved in the Blasco raid were "instructed to shut off the possible avenues of escape." Id. Finally, regarding the nature of the area involved in Blasco, the court expressly noted: "The Cohen estate is situated in a secluded area, the kind frequently utilized for off-load operations." Id. at 1332.

In the case at bar, the undisputed testimony of the arresting officers was that they could not preclude the possibility that someone escaped from the residences involved prior to the time the officers reached the scene from the surveillance point across the canal. [TR. 423]. No officers were positioned to prevent suspects from escaping via the canals which ran along both sides of the area in question. [TR. 480]. The photographic evidence introduced at trial clearly revealed that the area in which the residences were located was not private and

secluded, but rather contained dozens of nearby homes into which any suspects could have entered and hidden. In addition, the record detects numerous escape routes along hundreds of yards of seawall giving access to both canals.

If the mere presence doctrine is to enjoy further viability and if this Court's precedent is to be honored, certiorari must be granted to remedy the constitutional aberration created by the Eleventh Circuit Court of Appeals in this case.

II.

The decision below creates irreconcilable conflict with various circuit court decisions including United States v. Lopez-Ortiz, 492 F.2d 109 (5th Cir. 1974); United States v. Reyes, 595 F.2d 275 (5th Cir. 1979); and United States v. Pintado, 715 F.2d 1501 (11th Cir. 1983).

The decision of the former Fifth Circuit Court of Appeals in United States v. Lopez-Ortiz, 492 F.2d 109 (5th Cir.), cert. denied, 419 U.S. 1052 (1974), is materially indistinguishable from the case at bar. There, a night-time surveillance revealed numerous people unloading large gunny sacks from a truck to the garage of a residence. A raid was conducted on the premises and the participants in the unloading operation "broke and ran." Two people were taken into custody in the immediate vicinity and Lopez-Ortiz was found hiding behind a rock wall dividing the premises from the next door

property. Despite the fact that numerous gunny sacks were in plain view and the odor of marijuana was prevalent, the court reversed the defendant's conviction for conspiracy to possess marijuana with intent to distribute it since his presence and flight did not prove the offense charged. Moreover, the court's decision was not altered by its finding that the defendant's story was impeached in at least three ways and its conclusion that these inconsistencies resulted in a jury verdict of guilty. The court, noting that the issue before it was not the credibility of the defendant's story, held:

> At best, the evidence establishes only that he was present in the area and had fled from federal officers. It does not show that he actually participated in the unloading operation, or began his flight from near the truck. Further, there was no testimony by the government agents that Lopez-Ortiz had approached and entered the house prior to the raid. Indeed, all the

> arresting officers could say was that they found him behind a nearby rock wall. 492 F.2d at 115.

The same conclusion should have been reached by the Eleventh Circuit Court of Appeals in this case.

The decision of the Eleventh Circuit is equally irreconcilable with the decision of the court in United States v. Reyes, 595 F.2d 275 (5th Cir. 1979). In Reyes, the defendants were found in a small airplane from which bales of marijuana had been dropped. There was no evidence that they pushed the bales out. Their convictions were reversed since:

> there was no direct testimony that any of them did so, much less that all of them participated. Each of the defendants was entitled to have his guilt or innocence determined as an individual; the government failed to prove beyond a reasonable doubt that each defendant or any particular defendant participated . . . 595 F.2d at 281 (emphasis by court).

The differentness of the court's decision

in this case, and even its own internal conflict, is palpably demonstrated by its subsequent decision in United States v. Pintado, 715 F.2d 1501 (11th Cir. 1983). This case and Pintado are remarkable for their factual similarities. Both involved Customs surveillances of houses bordering canals in the Florida Keys. Both involved marijuana off-load operations from a vessel docked behind the premises involving numerous, unidentified people. In each case, a raid by numerous Customs officials resulted in the arrests of all the suspects they were able to find at the scene.

In Pintado, after two suspects were arrested outside, others ran into the house and were followed by Customs agents:

> Two agents climbed the stairs to the second floor of the house and were confronted with a pair of locked doors. An official knocked on one of the doors, announced in English "U.S. Customs" and asked whoever was in the room to come out. When

> no response was received, the door was forced open. Appellant, wearing a pair of pants and perhaps a shirt, was found hiding in the closet. 715 F.2d at 1503.

In the case at bar, various police vehicles with flashing blue lights and sirens sounding converged on the premises. Various suspects ran in various directions. [TR. 92]. According to surveilling agents, at least three people entered the house where the Petitioners were ultimately arrested. [TR. 93, 381]. The lead officer admitted he had not seen the people on the stairs enter the house and did not know whether the Petitioners were the same people he had seen previously. [TR. 493-494]. No government witness was able to identify either LOPEZ-LLERENA, PARRA, or BORGES as having been involved in the unloading of either of the two vessels. [TR. 143]. Ultimately, fifteen minutes after the initial raid, agents climbed an outdoor rear staircase to

the upper floor of the house. The door was open and whispered voices could be heard from inside. [TR. 282-283]. The officers announced their presence and ordered the occupants of the premises out whereupon the Petitioners LOPEZ-LLERENA, PARRA, and BORGES exited voluntarily.

Despite the graphic similarities in the two cases, the Pintado court reversed the conviction of the accused while the Lopez-Llerena court affirmed.

The distinctions between Pintado and Lopez-Llerena are noteworthy too, because they demonstrate, even more compellingly, that the convictions in the case at bar cannot be sustained. In Pintado, security lights in the rear of the house were lighted and dock lights along the canal were illuminated. In the case at bar, the off-load operation was conducted in the blackness of night -- so dark, in fact, that even with

a night scope all that could be seen by the surveilling officers were silhouettes. [TR. 169-170, 199]. The Petitioners here were found in the part of the house facing the street, not the part of the house facing the canal. [TR. 284]. Thus, the conclusion reached by the Pintado court that there were "no objective facts or circumstances from which Appellant's knowledge of the on-going operation could be inferred" is all the more compelled here.

In Pintado, defense counsel's preposterous argument that the defendant had been sleeping in the bedroom at the time the Customs officials entered the house was refuted by the fact that he was clothed in pants and a shirt. In the case at bar, there was sufficient clothing and food in the ice box and on the counters at the house for two or three people on an "overnight trip" -- facts utterly consistent with the

Petitioners' explanation of their presence. [TR. 300]. Neither LOPEZ-LLERENA, PARRA, nor BORGES had any weapons. [TR. 306]. There were no two-way radios, as were found elsewhere, in the bedroom where the Petitioners were found. [TR. 306]. The bedroom did contain, however, a television and a video recorder consistent with the Petitioners' testimony that they had been watching television prior to their arrests. [TR. 307-308; Government's Exhibit P44]. The agents in Pintado had to forcibly break locked doors to effectuate the defendant's arrest. In the case at bar, LOPEZ-LLERENA, PARRA, and BORGES exited upon request. None of the Petitioners resisted the officers in any way. [TR. 284-285, 305]. Neither LOPEZ-LLERENA, PARRA, nor BORGES made any effort to hide or flee contrary to the furtive hiding of Pintado in a closet (and, for that matter, the actions of various other

defendants in this case).

In this case, there were no fingerprints, no photographs, no evidence of the Petitioners' recent exertion, no marijuana residue, no statements, no contraband on any of the Petitioners' persons, or evidence of flight. There existed, as in Pintado, absolutely no objective facts or circumstances from which the Petitioners' knowledge of the on-going operation could be inferred. See, e.g., Pintado, supra at 1505.

The opposite conclusions reached by two panels of the Eleventh Circuit within the period of a month on the same issue and, for all intents and purposes, the same facts, are

utterly irreconcilable.[1] Certiorari must be granted to resolve the conflict created by the Eleventh Circuit Court of Appeals and to remedy the injustice suffered by ALBERTO LOPEZ-LLERENA, FELIX PARRA, and JOSE BORGES.

---

[1]The unsettled state of the law does not appear to be unappreciated by the juries that tried either Pintado or the Petitioners here. Both juries failed to convict the defendants on Count II of their Indictments charging possession of marijuana with intent to distribute while each, apparently compromising, rendered guilty verdicts solely on the conspiracy count.

CONCLUSION

The case below characterizes a radical departure from the substantive body of case law developed by this Court as well as the Fifth Circuit Court of Appeals regarding mere presence at the scene of a crime. The matter involved in this case is of extreme judicial significance. The maintenance of uniformity in the administration of criminal justice in the federal courts, particularly the Eleventh Circuit, is jeopardized by the decision below. For the reasons and authority

advanced above, therefore, the Petitioners strenuously urge this Court to grant its Writ of Certiorari in this case.

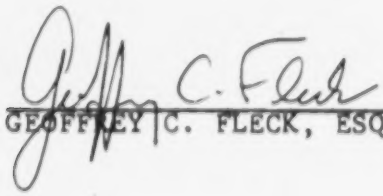
WEINER, ROBBINS, TUNKEY & ROSS, P.A.
Attorneys for Petitioners
2250 Southwest Third Avenue
Miami, Florida 33129
Telephone: (305)858-9550

GEOFFREY C. FLECK, ESQUIRE

WILLIAM R. TUNKEY, ESQUIRE

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that all parties required to be served herein have been served and further certify that three copies of the foregoing Petition have been served by United States mail this 13th day of February, 1984, upon the Office of the United States Solicitor General, 10th and Constitution Avenue, N.W., Washington, D.C. 20530, and a copy upon Lurana S. Snow, Esquire, Office of the United States Attorney, 299 E. Broward Boulevard, Fort Lauderdale, Florida 33301.



GEOFFREY C. FLECK, ESQUIRE

APPENDIX A

Opinion in the Court Below.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Alberto LOPEZ-LLERENA, Felix Parra, Jose Borges, Jose Delfin Mule Vasquez, Lazaro Cruz, Jr., Hector Theodore Valdes, Fausto Manuel Sanchez, Raul Pinera, Carlos Oliver-Chirino, and Jose Luis Marino,
Defendants-Appellants.

No. 82-5916.

United States Court of Appeals,
Eleventh Circuit.

Aug. 30, 1983.

Appeals from the United States District Court for the Southern District of Florida.

Before FAY and KRAVITCH, Circuit Judges, and ATKINS*, District Judge.

PER CURIAM:

AFFIRMED; Circuit Rule 25. See United States v. Blasco, 720 F.2d 1315 (11th Cir. 1983).

*Honorable C. Clyde Atkins, U.S. District Judge for the Southern District of Florida, sitting by designation.

APPENDIX B

Order Denying Petition for Rehearing and Rehearing En Banc.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Alberto LOPEZ-LLERENA, Felix Parra, Jose Borges, Jose Delfin Mule Vasquez, Lazaro Cruz, Jr., Hector Theodore Valdes, Fausto Manuel Sanchez, Raul Pinera, Carlos Oliver-Chirino, and Jose Luis Marino, Defendants-Appellants.

No. 82-5916.

United States Court of Appeals,
Eleventh Circuit.

Dec. 16, 1983.

Defendants were convicted in the United States District Court for the Southern District of Florida, Jose A. Gonzalez, Jr., J., of conspiracy to possess marijuana with intent to distribute. The Court of Appeals affirmed, slip op. p. 854, ___ F.2d ___. On petitions for rehearing, the Court of Appeals held that there was sufficient evidence beyond defendants' presence and flight to

support convictions for conspiracy to possess marijuana with intent to distribute.

Petitions denied.

Appeals from the United States District Court for the Southern District of Florida.

ON PETITIONS FOR REHEARING

(Opinion August 30, 1983, 11th Cir., 1983, slip op. p. 854, ___ F.2d ___).

Before FAY and KRAVITCH, Circuit Judges, and ATKINS*, District Judge.

PER CURIAM:

A panel of this court affirmed the appellants' convictions pursuant to Circuit Rule 25, relying on United States v. Blasco, 702 F.2d 1315 (11th Cir. 1983). The

*Honorable C. Clyde Atkins, U.S. District Judge for the Southern District of Florida, sitting by designation.

appellants have filed a petition for rehearing and a suggestion for rehearing en banc, contending that the affirmance of their convictions is in conflict with this court's subsequent decision in United States v. Pintado, 715 F.2d 1501 (11th Cir. 1983). We disagree and deny the petition for rehearing.

Like the appellants in this appeal, the defendants in Blasco and Pintado challenged the sufficiency of the evidence for their convictions under 21 U.S.C. §846 of conspiracy to possess marijuana with intent to distribute. Both Blasco and Pintado were decided on the principle that although presence and flight alone are insufficient to establish that the defendant was a member of the drug conspiracy, a reviewing court must consider the totality of the circumstances, including the facts of presence and flight, to determine "if there is substantial evidence to support [the jury verdict] when

the facts are viewed in the light most favorable to the government." United States v. Blasco, 702 F.2d at 1331-32 (quoting U.S. v. Davis, 666 F.2d 195, 201 (5th Cir. Unit B 1982))[1]; U.S. v. Pintado, at 1503. This standard of review complies with our holding in U.S. v. Bell, 678 F.2d 547 (5th Cir. Unit B 1982) (en banc), aff'd on other grounds, ___ U.S. ___, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983):

> It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of facts could find that the evidence establishes guilt beyond a reasonable doubt. A jury is free to choose among reasonable constructions of the evidence.

[1] In Blasco we found that the totality of the circumstances would have allowed a reasonably cautious jury to conclude that the

---

[1]This circuit has adopted Unit B decisions of the former Fifth Circuit as binding precedent. Stein v. Reynolds Securities, Inc., 667 F.2d 33, 34 (11th Cir. 1982).

appellants were involved in a drug conspiracy. The off-loading operation had taken place early in the morning at a secluded setting, and the agents had testified to the noise of the operation and the heavy smell of marijuana. The panel found that "it strains the imagination that these appellants were not aware of the off-loading taking place on the dock outside the house," 702 F.2d at 1332, and concluded that a jury could have found beyond a reasonable doubt that the defendants were guilty. Id. Blasco thus did not overrule our prior cases in this area, but simply brought them into accord with the Bell decision.[2]

---

[2]The appellants, for example, rely on U.S. v. Lopez-Ortiz, 492 F.2d 109 (5th Cir. 1974). Lopez-Ortiz, however, was decided prior to Bell and concluded that the evidence to be sufficient to convict had to "exclude every reasonable hypothesis save that of guilt, at least where, as here, there are explanations of presence and motives for flight that are consistent with innocence." 492 F.2d at 115. Thus the holding of Lopez-Ortiz, that mere presence and flight is insufficient evidence to convict, still is

In Pintado, a review of the totality of the circumstances led to a reversal of the defendant's conviction. Agents testified that at 1:40 a.m. "about six" persons were seen quickly and silently unloading large bundles from a boat docked behind the house. Customs officials approached in a car with lights flashing and announced "U.S. Customs." Two individuals were apprehended outside; the rest fled into the house. Three males and a female were arrested downstairs. Pintado was discovered hiding in a closet after officers forced open a locked bedroom door upstairs. A total of seven persons were arrested. Although at trial Pintado claimed that he had been sleeping during the off-loading operation and was unaware of the events outside, he was wearing a pair of

---

valid, but a post-Bell court need not exclude "every reasonable hypothesis save that of guilt" to uphold the conviction.

pants and a shirt when found.

This court found that the jury could have reasonably rejected the defendant's claim that he was sleeping, but that there was no other evidence besides his presence and hiding to infer that he was a member of the conspiracy. The operation had been carried out silently and the marijuana had been placed in a garage that was not visible from the room where the appellant was discovered. Several sets of damp and dirty clothing were found downstairs; the government, however, did not show the number or sizes of the clothing or in any way connect the clothes with Pintado. Furthermore, the government was unable to correlate the number of individuals arrested and indicted with the Customs official's observations of the number of people involved in the unloading process. The official estimated that "about six" persons were involved, but admitted that he

could not tell whether four, five, six, seven or some other number of individuals were actually present.[3]

[2] Unlike Pintado, a review of the totality of the circumstances in this case demonstrates that the jury could have found beyond a reasonable doubt that the appellants were involved in the drug conspiracy. Two agents, one using a star scope, observed from one hundred feet away the separate unloadings of the SUNSHINE and the ODETTE, each time counting eleven individuals forming a line to pass the bales from the boat up to the house.[4] Around 2 a.m., law enforcement

---

[3]Furthermore, of the seven individuals arrested (six males and one female), only the six males were indicted, although "what appeared to be a female" was observed out on the seawall only forty minutes prior to the raid. An additional reason thus existed to doubt that the government's estimate of "about six" offloaders were the same six who were indicted.

[4]Because of the darkness, the agents could not identify any of the individuals involved merely through their observations of the unloading.

officers moved in for the arrest with sirens and lights flashing, and the eleven individuals scattered. A DEA helicopter appeared minutes later, hovering overhead with its landing lights on.

The officers observed the various individuals as they fled to several areas. The first four arrested were found hiding in a cluster of sea grapes. The officer with the star scope had watched them jump a fence and take cover. Three individuals were seen running up the outside stairs to the upper level of the house and were apprehended after a search of the house; no one else was found in the house or seen escaping. Three other appellants were arrested after being observed running towards a fence near the canal; one was found swimming in the canal (although the night was very cold) and two hiding under a rock ledge. The last defendant was discovered hiding under the dock after an

agent had seen him disappear into the shadows of the ODETTE. The first arrest occurred within four minutes of the commencement of the raid; the last arrest took place approximately ten minutes later.

[3] The appellants argue that reasonable doubt existed because the officers conceded that they could not be sure that no one had escaped and because there was evidence that other individuals had been present.[5] One of the three defendants found upstairs also testified at trial that they had been watching T.V. during the unloading, unaware

---

[5]The defendants primarily rely on evidence that two wallets were found containing eight hundred to a thousand dollars which did not belong to any of the defendants, that none of the defendants owned either the boats or homes involved, and that although an individual with an Uzi machinegun was seen patrolling, the machinegun was never found. The government, however, need not prove that other individuals were not on the grounds during the evening or were involved in the overall conspiracy (for example, providing the boats), but only that the eleven appellants who were arrested participated in the conspiracy.

of the events going on in the back yard.

Viewing the evidence as most favorable to government, Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), we find sufficient evidence beyond the appellants' presence and flight to support the convictions. Although the officers did not testify as to the noise of the unloading or the smell of marijuana, two boats were unloaded at different times in the early hours of the morning by a human chain of eleven individuals -- circumstances that would allow a jury to reasonably infer that those present were aware of the operation. (Furthermore, and importantly, the officers were able to testify as to where the individuals had fled in attempting to escape, and they were subsequently found and arrested in these locations.) Finally, unlike Pintado, the number of individuals observed unloading, eleven, corresponded with the

number of persons found and arrested.[6]

The three individuals arrested in the upstairs room argue that their case is identical to Pintado's, who also was found hiding in an upstairs room. Yet, here, the officers saw three individuals going upstairs and no other individuals were found in the house. We thus have a further element not present in Pintado, where an unknown number of individuals had fled into the house when the raid commenced and no one saw any of those fleeing run up the stairs to the bedroom.

---

[6]Unlike Pintado, the agents in this case did not estimate that "about eleven" were involved, but testified that they had counted nine individuals on shore and two persons on the ODETTE unloading before the raid. The defendants point out that at an earlier trial one of the officers had testified that "about nine" were on shore unloading a boat that had docked earlier, the SUNSHINE. Even assuming that the officer was making an estimate of those on shore for unloading the SUNSHINE, his testimony does not suggest that he estimated the number of persons participating in the later unloading of the ODETTE, which was the vessel that was docked when the raid occurred.

The facts of this case are not identical to either Blasco or Pintado. A review of all the circumstances, however, leads us to conclude that the facts here are more akin to Blasco, as there are circumstances beyond presence and flight that provided sufficient evidence for a jury to find beyond a reasonable doubt that the appellants were part of a drug conspriacy.

The petition for rehearing is DENIED.